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No 88-6075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DARRYL JAMES,

Petitioner,

v.

Illinois,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF

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ARGUMENT

I. CONTRARY TO THE DECISIONS OF THIS COURT, THE ADMISSION OF PETITIONER'S SUPPRESSED STATEMENTS TO REBUT THE TESTIMONY OF A WITNESS CALLED IN HIS DEFENSE ALLOWED THE STATE TO USE THIS ILLEGALLY OBTAINED EVIDENCE AS SUBSTANTIVE PROOF OF GUILT.

A. The Use Of A Defendant's Statements To Rebut The Testimony Of A Defense Witness Requires That The Statements Be Admitted As Substantive Evidence.

Respondent initially disputes the proposition that the method of impeachment at issue here necessarily involves the introduction of the rebutting statements to prove the truth of the matter asserted therein. According to respondent, in the present case the evidence that petitioner at one time stated that his hair was red on the day of the offenses without more served to discredit Jewel Henderson's contrary testimony. (Brief for Respondent 15-16) No authority is cited in support of this assertion, nor does respondent suggest how petitioner's statement would tend to show that Ms. Henderson lied or erred without the jury first finding that petitioner's statement embodied the truth.

By advancing this argument respondent repeats the error of the majority opinion below in failing to recognize the differing theories of relevancy underlying impeachment by self-contradiction and impeachment by contradiction. (J.A. 38) In the former case the mere fact that a witness has previously made an inconsistent statement does by itself serve to discredit him; but in the latter case, at issue here, the witness will be discredited only if the trier of facts accepts the contradicting testimony as true. 3A J. Wigmore, Evidence § 1000, 1018 (Chadbourne rev. 1970). Thus, in order to discredit Jewel Henderson's testimony, petitioner's tainted statements had to be admitted

and used as substantive proof of the color of his hair on the date in question.[1]

Because discrediting a witness' testimony by rebuttal is based upon proving that the witness erred, respondent's contention that it is possible to limit rebuttal evidence to a non-substantive purpose is untenable. (Brief for Respondent 16-17, 18-19) In the present case, for example, it would do no good to instruct the jury that the evidence concerning petitioner's statements could be considered only as it may affect the believability of Jewel Henderson and not as evidence of the crimes charged, since petitioner' statements would affect Ms. Henderson's believability only if the jury concluded that the facts stated therein were true. That petitioner's trial counsel tendered such an instruction (J.A. 13) does not support respondent's contention that this evidence could be properly limited to "impeachment". (Brief for Respondent 16) After trial counsel's objections to the admission of petitioner's statements were overruled, his request for a limiting instruction reflects nothing more than an attempt to mitigate the prejudice; (Supp. R. 131-134, 159-160) it does not establish that he believed such an instruction would or could be efficacious.

Finally, respondent argues at length that for various reasons any error in the instructions or the prosecutor's closing argument does not warrant reversal. (Brief for Respondent 17-22) These arguments need not be

[1] With respect to this issue petitioner and respondent's *amicus* are in complete accord. (See Brief for the United States 14 n.3) Petitioner also agrees with respondent's *amicus* that the interests of clarity would be better served by referring to impeachment by contradiction as rebuttal. (*Ibid.* n.3 at 15; see also the dissenting opinion of Justices Clark and Stamos below, J.A. 47-49)

addressed as petitioner does not urge either of these issues as an independent ground for relief. In his brief petitioner cites that trial court's oral limiting instruction and the prosecutor's closing argument only as support for his contention that the introduction his tainted statements as rebuttal evidence involved the use of these statements as substantive proof of guilt. Beyond this purpose, the relevance of these matters lies in the fact that they were relied upon by the Illinois Appellate Court as reasons why the error in admitting petitioner's statements could not be deemed harmless. (J.A. 22-23)

B. The Decisions Of This Court Do Not Permit The Use Of Illegally Obtained Evidence As Substantive Proof Of Guilt At Any Stage Of The Trial.

While respondent does not dispute this point, (Brief for Respondent 22) respondent's *amicus* argues that the use of illegally obtained evidence for rebuttal purposes is not at odds with the decisions of this Court in the impeachment exception cases. According to the United States, in each of these cases the Court merely noted that instructions were given limiting the use of the tainted evidence to the issue of the defendant's credibility but did not rely on this fact in sanctioning the admission of the evidence. As respondent's *amicus* views these cases, the controlling consideration was not the purpose for which the tainted evidence was used but rather was the fact that it was not introduced during the government's case in chief. (Brief for the United States 17-18) This reading of the impeachment exception cases is refuted not only the specific holding in each case but also by later decisions of the Court characterizing these holdings.

In each of the impeachment exception cases the Court held that the constitution did not forbid the use of illegally

obtained evidence for the non-substantive purpose of challenging the defendant's credibility. *Walder* v. *United States*, 347 U.S. 62, 64 (1954) (physical evidence admissible "solely for the purpose of attacking the defendant's credibility"); *Harris* v. *New York*, 401 U.S. 222, 226 (1971) ("petitioner's credibility was appropriately impeached by use of his earlier conflicting statements"); *Oregon* v. *Hass*, 420 U.S. 714, 723 (1975) (defendant's statements not inadmissible "for purposes of [his] impeachment"); *United States* v. *Havens*, 446 U.S. 620, 627 (1980) (defendant's testimony on proper cross-examination "subject to otherwise proper impeachment" with illegally obtained evidence). These specific holdings demonstrate that the Court's reference to the limiting instruction given in each case was not incidental, as the United States suggests, but rather that the fact that instructions were given limiting the tainted evidence to a non-substantive purpose was essential to the Court's judgment.

That the impeachment exception decisions were based on the fact that the tainted evidence was not used as proof of guilt is shown in subsequent cases. For example, in *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), the Court stated that in *Harris* v. *New York*,

> . . . the Court did sanction use of statements obtained in violation of *Miranda* to impeach the defendant who had made them. The Court was careful to note, however, that the jury had been instructed to consider the statements "only in passing on [the defendant's] credibility and not as evidence of guilt" (citation omitted)

468 U.S. at 429 n.9. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), as an example of the assumption that jurors follow their instructions, the Court observed that in *Harris* v. *New York*,

> . . . we held that statements elicited from a defendant in violation of *Miranda* v. *Arizona*, (citation omitted) can be introduced to impeach the defendant's credibility, even though they are inadmissible as evidence of his guilt, so long as the jury is instructed accordingly.

481 U.S. at 206-207. See also, *New York* v. *Quarles*, 467 U.S. 649, 575 n.6 (Marshall, Brennan and Stevens, JJ., dissenting) (in *Harris* v. *New York* introduction of statements to impeach a defendant ". . . was tolerated only because the jury had been instructed to consider the statements 'only in passing on [the defendant's] credibility and not as evidence of guilt'" (citation omitted)).

It is true that in *Harris*, *Hass* and *Havens* the Court concluded that the ends of the exclusionary rules were adequately served when the tainted evidence was made unavailable to the prosecution in its case in chief. *Harris*, 401 U.S. at 225; *Hass* 420 U.S. at 722; *Havens*, 446 U.S. at 627. However, this conclusion was reached solely in context of the use of illegally obtained evidence for the limited purpose of impeachment and provides no support for the proposition that such evidence could be used substantively at the rebuttal stage of the trial. Any such notion is dispelled by the Court's holding in *Havens* that a defendant's testimony on proper cross-examination is subject to impeachment by illegally obtained evidence ". . . that is inadmissible on the government's direct case, *or otherwise*, as substantive evidence of guilt." *United States* v. *Havens*, 446 U.S. at 628. (emphasis added)

Because the admission of tainted evidence for rebuttal purposes has the prohibited effect of allowing the government to use the fruits of its unlawful conduct to secure a conviction, *Walder* v. *United States*, 347 U.S. 62, 64-65 (1954), it is unquestionably at odds with the Court's

impeachment exception cases. Indeed, affirmance of the judgment below would necessarily mean that limiting instructions need no longer be given in cases in which a defendant's testimony is at issue. If illegally obtained evidence may be used substantively to rebut the testimony of defense witnesses, there would be no basis for continuing to forbid such use with respect to a defendant's own testimony.

II. AFFIRMANCE OF THE DECISION BELOW WOULD UNDERMINE THE DETERRENT FUNCTION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE BY PROVIDING THE POLICE WITH A SIGNIFICANT INCENTIVE TO MAKE ARRESTS FOR QUESTIONING IN THE ABSENCE OF PROBABLE CAUSE.

A. Respondent's Contention, That Permitting The Use Of Illegally Obtained Statements For Rebuttal Purposes Would Not Provide A Significant Incentive For Police Misconduct, Ignores The Greatly Enhanced Value To The Government That Tainted Statements Would Have Under This Broad Exception To The Exclusionary Rule.

Respondents argues that because illegally obtained statements will still be inadmissible in the State's case in chief, the possibility that adoption of a rebuttal exception to the exclusionary rule would encourage police misconduct is not greater than that which the Court deemed speculative in its impeachment exception cases. In respondent's view it is unrealistic to assume that police officers will make illegal arrests to obtain statements that could only be used to contradict the testimony of a witness that the defendant may call in his defense. (Brief for Respondent 13-14, 23) In advancing this argument respondent fails to recognize, or acknowledge, the true extent to which tainted statements would be of value to the prosecution under a rebuttal exception.

First, after allowing that ". . . the need for deterrence . . . is strongest when the Government's unlawful conduct would yield substantive evidence which could be used to prove the elements of its case against an accused . . .", (Brief for Respondent 22) respondent simply ignores the fact that this is precisely the purpose for which illegally obtained evidence will be admissible if the rule it argues for is adopted. Moreover, as noted above, if a rebuttal exception is sanctioned its rationale would permit the substantive use of tainted evidence when introduced to challenge a defendant's own testimony as well as that of any defense witness. (Reply Brief) Approval of a rebuttal exception would therefore invite Fourth Amendment violations because statements derived therefrom would be of far greater benefit to the prosecution in terms of both probative value and opportunity for use at trial than is presently true under the impeachment exception.

Secondly, the greater incentive for police misconduct that would exist if the decision below is affirmed does not depend on the actual use of the tainted statements at trial as the majority opinion believed. (J.A. 36) Because illegally obtained statements would be admissible as substantive proof of guilt under a rebuttal exception, police officers will expect that in many cases the accused will choose not to present any testimony in his defense rather than face the introduction of such damaging evidence. The failure of the defendant to present any evidence obviously enhances the prospects for obtaining a conviction, the objective which lies at the heart of a police officer's "zone of primary interest." *United States* v. *Janis*, 428 U.S. 433, 458 (1976). Thus, the incentive to obtain statements by unconstitutional methods for this purpose cannot be discounted as unrealistic or speculative. As one of the dissenting opinions below observed, allowing the use of tainted evidence for rebuttal

> . . . would unduly encourage law enforcement authorities to violate the fourth amendment routinely so as to garner evidence which could be held in reserve, thereby inhibiting the accused from presenting evidence in his own defense.

(J.A. 44) (Clark and Stamos, JJ., dissenting) See also, *State* v. *Hubbard*, 103 Wash.2d 570, 693 P.2d 718, 722 (1985).

Contrary to respondent's suggestion (Brief for Respondent 27-28) the above concern does not depend on the assertion of a Sixth Amendment right to present false testimony. Petitioner does not contend that such a right exists, and in the context of deterring police misconduct its non-existence is irrelevant. When the issue is the impact a particular rule will have on deterrence, the focus must necessarily be on the perspective of the relevant actor, and the controlling question is whether the adoption of the rule will encourage constitutional violations. *Brown* v. *Illinois*, 422 U.S. 590, 602 (1975). In the present case, adoption of a rebuttal exception would provide the police with a greater incentive to make unlawful arrests because statements obtained thereby would be of value as a means to deter the accused from presenting any evidence in his defense; and from the point of view of the police, the fact that this chilling effect may be a permissible one under the Sixth Amendment is irrelevant.

Finally, respondent cites the Court's decision in *United States* v. *Leon*, 468 U.S. 897 (1984) as supporting the proposition that in terms of the effect in deterrence, there is no significant difference between permitting tainted evidence to be used for impeachment and permitting its use as substantive evidence. (Brief for Respondent 24-25) Respondent's reliance on *Leon* is wholly misplaced as that case has nothing to do with the issue presented here. It is

true that in *Leon* the Court held that on the facts before it the exclusionary rule did not bar the use of illegally obtained evidence as substantive proof in the government's case in chief. However, this holding was not in any way based on a conclusion that permitting the substantive use of tainted evidence would not serve to encourage police misconduct; it was based on the Court's conclusion that when the police act in objectively reasonable reliance on a search warrant, there is no police misconduct to deter. *Leon*, 468 U.S. at 919-921.

The present case does not involve good faith or warrants, nor does it involve "alleged" police misconduct. (Brief for Respondent 15) The trial court found that petitioner was arrested and questioned by the police in the absence of probable cause, and respondent has never challenged that finding. The question before the Court is whether permitting tainted statements to be used as substantive evidence in rebuttal will encourage such serious Fourth Amendment violations, and with respect to this question the Court's decision in *Leon* provides no support for respondent's position.

B. The Cost To The Truth-Seeking Process Of Continuing To Bar The Use Of Tainted Evidence For Rebuttal Purposes Is No More Than Is Necessary To Deter Fourth Amendment Violations.

Respondent argues that the rule adopted by the Illinois Supreme Court should be approved because the harm to fact-finding process at trial caused by prohibiting the use of illegally obtained evidence for rebuttal purposes is equal to that involved in the impeachment exception cases. (Brief for Respondent 11-13) It is of course undeniable that application of the exclusionary rule to rebuttal evidence means that the prosecution is unable to use relevant evidence to challenge the conflicting testi-

mony of defense witnesses, but this is only one-half of the equation under the Court's balancing test. The suppression of probative evidence is not too great a cost when necessary to deter Fourth Amendment violations. *Stone* v. *Powell*, 428 U.S. 465, 492-493 (1976). The sanctioning of a rebuttal exception would provide far more incentive for police misconduct than is present under the limited impeachment exception. Therefore, while the cost to the fact-finding process may be similar, the greater harm to deterrence under a rebuttal exception mandates that the balance be struck in favor of exclusion.

Furthermore, respondent in fact overstates the cost of barring the use of illegally obtained statements for rebuttal purposes. Respondent asserts that such a bar presents the same danger of the integrity of the adversary process that the Court sought to prevent in the impeachment exception cases, by allowing a defendant to present false evidence through other witnesses. (Brief for Respondent 11-13; See also, Brief for the United States 16 (such a bar "grants a license to engage in perjury by proxy")) However, in this regard the situation at issue here and that involved in the impeachment exception cases differ in two respects.

When a defendant's testimony is inconsistent with his own prior statement, this self-contradiction necessarily casts doubt upon his veracity. In such a case, "[it is] logical to infer, absent an explanation to the contrary, that the defendant was lying on one occasion or the other," *Jenkins* v. *Anderson*, 447 U.S. 231, 253 (1980) (Marshall and Brennan JJ., dissenting), and was resorting to perjurious testimony in reliance on the shield of the exclusionary rule. *Walder* v. *United States*, 347 U.S. 62, 65 (1954). When the testimony of another witness conflicts with the defendant's statement, however, an inference of

perjury on the witness' part cannot be drawn because the inconsistency may be due to "differing impressions or recollections by the defendant and the witness." (J.A. 43) (Ward and Stamos JJ., dissenting)

Secondly, the potential for the use of perjury is much greater in the case of the testimony of defendants than is true for other witnesses. Any defendant can testify falsely if he chooses to do so, but contrary to respondent's assertion that "a defendant may simply ask someone to lie for him," (Brief for Respondent 12) it cannot be assumed that it will be so easy to find others who are willing to commit perjury. While a defendant facing a serious charge may not be deterred by the fear of being prosecuted for perjury, the same cannot be said about other defense witnesses, even those who may be the defendant's friends or relatives.

Finally, respondent's *amicus* contends that the harm to the truth-seeking process is even greater when the testimony of a defense witness cannot be challenged than when the defendant's own testimony is at issue, because "the natural skepticism that accompanies testimony from a defendant is not present, or not as strong, in the case of testimony from other witnesses." (Brief for the United States 17) However, as *amicus* acknowledges, if one proceeds on the assumption that the defendant is engaging in perjury by proxy, it must also be assumed that he could do so only with the aid of a "friendly" witness. In such a case, the witness' relationship to the defendant will give rise to the same natural skepticism which is said to accompany a defendant's own testimony.

In conclusion, while prohibiting the use of tainted evidence for rebuttal purposes may mean in some cases perjury by a defense witness will go unchallenged,

respondent overstates the magnitude of this concern, and in any event this potential cost is heavily outweighed by the harm to the right of all citizens to be secure against illegal seizures that would be caused by the sanctioning of a rebuttal exception to the exclusionary rule. Petitioner therefore requests that the judgment of the Illinois Supreme Court be reversed.

Respectfully submitted,

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